

Berliner Corcoran & Rowe LLP

From the Selected Works of Perry S. Bechky

March 4, 2019

US Sanctions & Export Controls: Implications for China

Perry S. Bechky



Available at: https://works.bepress.com/perry_bechky/25/

BCR 

US Sanctions & Export Controls:
Implications for China



Perry Bechky
Partner, Berliner Corcoran & Rowe LLP
Visiting Scholar, Seattle University School
of Law
Beijing International Arbitration Center
4 March 2019

BCR 

Road Map

- OFAC – Office of Foreign Assets Control
 - Treasury Department
- ITAR – International Traffic in Arms Regulations
 - State Department, Directorate of Defense Trade Controls (DDTC)
- EAR – Export Administration Regulations
 - Commerce Department, Bureau of Industry and Security (BIS)
- DOJ – Department of Justice
 - Criminal prosecutions


2

BCR 

Export Controls (briefly)

| | |
|---|---|
| <p>State</p> <ul style="list-style-type: none"> ▣ US Munitions List ▣ Defense articles and services ▣ Export and reexport Includes deemed exports ▣ Complete ban for China | <p>Commerce</p> <ul style="list-style-type: none"> ▣ Commodity Controls List ▣ Dual-use goods and tech ▣ Export and reexport Includes deemed exports ▣ Many restrictions for China ▣ BIS Entity List – Ex: ZTE ▣ Duplicative penalties with OFAC |
|---|---|

3

BCR 

Two Main Types of Sanctions

| | |
|--|---|
| <p>Primary Sanctions</p> <ul style="list-style-type: none"> ▣ Violations punished by criminal prosecution and civil penalties ▣ Mainly restrict activities by US persons, but with important exceptions affecting non-US persons. For some violations, BIS can cut off US suppliers. ▣ OFAC / some overlap w BIS | <p>Secondary Sanctions</p> <ul style="list-style-type: none"> ▣ Economic “sticks” to encourage 3d-country companies to avoid business with sanctioned countries and persons ▣ Biggest “stick”: Asset freeze and near-total bar on doing business with US ▣ OFAC or State Dept |
|--|---|


4

BCR 

OFAC Overview

- Main statute – IEEPA
 - International Emergency Economic Powers Act
- Main targets today
 - Cuba
 - Iran
 - North Korea
 - Russia/Crimea
 - Syria
 - Venezuela
 - SDN List and 50% Rule
- Details vary widely and can change without notice

5

BCR 

Common OFAC Prohibitions

- Blocking
 - Freezes assets
 - Effectively prohibits virtually all dealings
- Import and export/**reexport** restrictions
 - Includes goods, services, and tech
- Restrictions on investment, lending & other financial transactions
- Approval and facilitation
- Evasion, attempt, conspiracy, and **causing violations**
- Travel (Cuba only)

4

BCR



Key Term – US Person

- US citizens
- US permanent residents (green card holders)
- Entities organized under US law
 - Includes US subsidiaries of foreign companies
 - Includes foreign branches of US companies
 - Cuba and Iran sanctions reach foreign subsidiaries too
- Persons located in the US
 - Includes temporary travelers
 - Includes US branches of foreign companies

7

BCR



Extraterritorial Effects

- Re-export controls
 - Includes controls on certain non-US goods with US inputs
- Causing violations by US persons
 - Especially banks
 - Can include customers, suppliers, employees, etc
 - Can include own US subsidiary
- Increasing criminal prosecution of willful violations by non-US persons

8

BCR



North Korea Case Study 1

- 31 Jan 2019 – ELF Cosmetics paid \$1MM penalty for importing 156 shipments of false eyelashes from China containing DPRK-origin materials
- No actual knowledge of the DPRK-origin materials
- Failed to exercise “sufficient supply chain due diligence while sourcing products from a region that poses a high risk to the effectiveness” of sanctions against DPRK
- ELF started supply chain audits to verify origin of materials (including checking suppliers’ bank records) and requires suppliers to sign certificates of OFAC compliance

9

BCR



North Korea Case Study 2

- 2016 - Dandong Hongxiang Industrial Development Co. Ltd. (DHID) and 4 associated individuals criminally charged for helping DPRK bank send payments through the US
- Named as SDNs
 - Can be named as an SDN (among other reasons) for materially assisting an SDN or for engaging “in at least one significant importation from or exportation to North Korea of any goods, services, or technology” (EO13810)
- Forfeiture suit to seize funds in 25 Chinese accounts

10

BCR



More Extraterritorial Effects

- ▣ Contractual commitments to comply
 - ▣ Especially required by banks
 - ▣ ELF likely to accelerate
- ▣ Securities offerings
 - ▣ Use of proceeds restrictions
 - ▣ Enhanced disclosures

11

BCR



Compliance

- ▣ OFAC expects businesses – including non-US businesses – to have compliance programs based on self assessment of sanctions risks
 - ▣ Living programs, implemented in practice, with updates and training
- ▣ Need internal controls capable of assuring compliance with legal obligations and voluntary commitments. Either refrain from business lawful for non-US persons or take care with all US connections
 - ▣ Ensure that US persons are not involved, including recusal policies
 - ▣ Due diligence
 - ▣ Segregate funds
 - ▣ Segregate US-origin or target-origin goods
 - ▣ Account for percentage of US-origin input
 - ▣ Account for percentage of sales to target countries
- ▣ Need different policies at level of US subsidiary and non-US parent

12

BCR



Thank you!

Please do not hesitate to contact me:



Perry Bechky
Berliner Corcoran & Rowe LLP
+1.202.293.9427
pbechky@bcr-dc.com
www.bcr-dc.com